OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Hon. Gary G. **GRAHAM** and Christopher Litras, *Plaintiffs-Appellants*,

v.

Robert A. **BUTTERWORTH,** Bradley E. King, *Defendants-Appellees*.

No. 92-3115.
United States Court of Appeals,
Eleventh Circuit.
Oct. 25, 1993.
(Reported at 5 F.3d 496)

Before FAY and HATCHETT, Circuit Judges, and JOHNSON, Senior Circuit Judge.

HATCHETT, Circuit Judge:

Because events subsequent to the filing of this lawsuit have rendered it moot, we dismiss this appeal.

I. FACTS

In 1990, Gary Graham was a candidate for the office of county court judge for Citrus County, Florida, and Christopher Litras, a resident of Citrus County, supported Graham in his campaign. As part of his campaign literature, Graham paid for the printing of 5,000 postcards reading: "I am supporting Judge Graham because: _____." The blank space allowed supporters to insert reasons for supporting

Graham. Supporters would then mail the postcards to other voters to inform them of Graham's campaign. Each postcard stated: "Paid for by the campaign account of Gary Graham," denoting that it was a paid political advertisement. Graham, Litras, and other supporters distributed approximately 50 to 100 of these postcards in Citrus County.

During the campaign, Graham also received a number of unsolicited letters from area voters. With the written consent of the voters, Graham paid to have some of their letters reprinted in local newspapers as part of an advertisement for Graham's candidacy. Each advertisement stated: "Paid for by campaign account for Gary Graham," indicating that it was a paid political advertisement.

During the campaign in August of 1990, Charles Horn, Graham's opponent, publicly accused Graham of violating Florida Statute § 105.071(11). Florida Statute § 105.071(11) reads: "A candidate for judicial office shall not: ... (11) Agree to pay all or any part of any advertisement sponsored by any person, group, or organization wherein the candidate may be endorsed for judicial office by any such person, group, or organization."

On August 27, 1990, Bradley King, State Attorney for the Fifth Judicial Circuit, which includes Citrus County, informed Graham that the distribution of the postcards and the publication of the letters of support violated the statute. Because the state attorney concluded that Graham did not have the requisite criminal intent to violate the statute, and Graham's opponent did not wish to have the grand jury investigate the incident, the state attorney took no further action.

Graham won the election for county court judge for Citrus County in 1990 and now states that he intends to seek reelection in 1994.[1] Litras states that he intends to support Graham's reelection bid. Graham also states that he intends to use similar advertising in the form of postcards and advertisements displaying unsolicited letters of support when he seeks reelection.

II. PROCEDURAL HISTORY

On March 16, 1992, Graham and Litras, collectively appellants, filed this lawsuit against Robert Butterworth, State of Florida Attorney General, and Bradley King, seeking declaratory and injunctive relief against enforcement of Florida Statute § 105.071(11). Butterworth and King, collectively appellees, filed a motion to dismiss, which the district court denied on June 26, 1992. On July 20, 1992, both parties filed cross motions for summary judgment. On October 6, 1992, the district court denied the appellants' motion for summary judgment and granted the appellees' motion for summary judgment, finding that the statute did not proscribe the appellants' intended conduct; thus, no actual threat of injury existed, and therefore, no "case or controversy" existed. The appellants brought this appeal.

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[1]After the district court's order issued on October 6, 1992, the Florida Supreme Court removed Graham from judicial office on June 24, 1993. *Inquiry Concerning a Judge, Re: Graham*, 620 So.2d 1273 (Fla. 1993).

III. CONTENTIONS OF THE PARTIES

The appellants contend that they have "standing" to challenge the statute because an opponent accused Graham of violating the statute, and the state attorney informed Graham that this conduct violated the statute; thus, the appellants were threatened with prosecution. The appellants also contend that the fact that the appellees have indicated that they will not prosecute does not divest standing because a future prosecutor remains free to prosecute the appellants or other judicial candidates under the statute. Moreover, the appellants argue that they have standing to challenge the statute under any circumstance because it is overbroad and has a chilling effect on political speech.

The appellees contend that the appellants' prior conduct did not violate the statute, and the appellants failed to show that they suffered an actual injury. Additionally, the appellees argue that the appellants cannot show that they are about to engage in conduct that the statute prohibits. Moreover, the appellees argue that the appellants' fear of the threat of prosecution is misplaced because the statute does not apply to their prior or intended conduct; thus, the appellees have continuously maintained that they cannot prosecute the appellants.

IV. ISSUE

We must decide whether the appellants have standing to challenge Florida Statute § 105.071(11), and if so, whether subsequent developments have rendered this case moot.

V. STANDARD OF REVIEW

We review *de novo* a district court's grant of summary judgment. *Key West Harbour Development Corp. v. City of Key West, Florida*, 987 F.2d 723, 726 (11th Cir. 1993).

VI. DISCUSSION

Article III of the United States Constitution requires that federal courts address only "cases and controversies." *Flast v. Cohen*, 392 U.S. 83, 94, 88 S.Ct. 1942, 1949, 20 L.Ed.2d 947 (1968). The case and controversy doctrine places a dual limitation upon federal courts which is termed "justiciability." *Flast*, 392 U.S. at 95, 88 S.Ct. at 1950. Justiciability, then, seeks to ensure that federal courts address only questions presented in an adversarial context and that the judiciary will not encroach upon the powers of other branches of government. *Flast*, 392 U.S. at 94-95, 88 S.Ct. at 1949-50. "Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action." *Flast*, 392 U.S. at 95, 88 S.Ct. at 1950.

A. Standing

Before a federal court may address the merits of a legal claim, the litigants must establish standing to sue. *Whitmore v. Arkansas*, 495 U.S. 149, 154, 110 S.Ct. 1717, 1722, 109 L.Ed.2d 135 (1990). Although the person challenging the statute does not have to await threatened injury to obtain relief, a plaintiff who challenges a statute must

demonstrate "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." *American Civil Liberties Union v. The Florida Bar*, 999 F.2d 1486, 1492 (11th Cir. 1993) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979)). Thus, an appropriate plaintiff is one who has "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution," not one who simply has "imaginary or speculative" fears of state prosecution. *Babbitt*, 442 U.S. at 298, 99 S.Ct. at 2308. With the principles of standing set forth, we now seek to determine whether the appellants had standing to challenge the statute.

At the time the appellants filed this action, Graham was a judicial candidate, a county court judge for Citrus County intending to seek reelection in 1994. During the prior campaign in 1990, the appellants engaged in arguably protected political conduct, and the state attorney advised Graham that the statute prohibited this campaign conduct. The state attorney declined to prosecute, however, because he believed that Graham lacked the criminal intent to violate the statute, and Graham's opponent did not seek a grand jury investigation. Nevertheless, at the time the appellants filed this action, a credible threat of prosecution existed because they intended to engage in arguably protected conduct, which the statute seemed to proscribe. *See ACLU*, 999 F.2d at 1492 (stating that a plaintiff must allege that he was threatened with prosecution, prosecution is likely, or a credible threat of prosecution exists). Hence, we hold that at the time the appellants filed this action, they had standing to challenge the statute.

B. Mootness

Although the appellants had standing when they filed this lawsuit, subsequent developments have rendered this case moot. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969).

After the appellants filed this lawsuit, the appellees withdrew their initial determination that the appellants' conduct violated the statute, and also informed the appellants that their intended campaign conduct would not fall within the ambit of the statute.[2] Thus, the appellees cannot seek prosecution against the appellants or other judicial candidates engaging in similar campaign conduct. Clearly, then, no possibility exists that the appellees will seek to enforce the challenged statute against the appellants or other judicial candidates intending to distribute postcards or print unsolicited letters of support of the type involved in this case in the future. *See ACLU*, 999 F.2d at 1494 (stating that some possibility must exist that the defendants will seek to enforce the challenged regulation).

We are aware that ACLU reached a different result; however, it is distinguishable. In ACLU, a judicial candidate, Larry Schack, desired to speak openly about his opponent in

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[2]Specifically, in the appellees' Motion to Dismiss, Answer to Standard Interrogatories, Motion for Summary Judgment, appellees briefs, and during oral argument to this court, the appellees repeatedly represented that the appellants' proposed campaign conduct does not violate the statute.

his campaign speeches. Aware that other judicial candidates had violated the Florida Code of Judicial Conduct (Code), Schack requested an advisory opinion from the Committee on Standards of Conduct Governing Judges regarding whether his proposed speeches would violate the Code. The Committee advised Schack that Canon 7(B)(1)(a) of the Code prohibited his proposed campaign speeches. Schack then asked the Judicial Qualifications Commission (JQC) whether it would enforce the canon against him; it refused to reply. Thus, Schack, joined by the ACLU, sued the Florida Bar (Bar) and the JQC.

After Schack filed suit, the Bar and the JQC stated that the canon did not prohibit Schack from making his proposed campaign speeches and that they did not intend to enforce the canon against him. The Bar and the JQC maintained, however, that the canon was constitutional. The court found that a live controversy existed, even after the Bar and the JQC acquiesced to Schack's position, because the Bar and the JQC maintained that the challenged canon was constitutional and that Schack's proposed speech fell within the parameters of what the canon regulated, but that they would not enforce it against Schack in this case; thus, a possibility existed that the Bar and the JQC would seek to enforce the challenged regulation against Schack or other judicial candidates in the future. *ACLU*, 999 F.2d at 1494.

In this case, however, the appellees have repeatedly stated that the statute does not prohibit the appellants' proposed conduct of distributing postcards and publishing unsolicited letters of support of the type involved in this case; thus, the appellees cannot enforce this statute against the appellants or other judicial candidates engaging in the same

conduct because, unlike in *ACLU*, the appellants' proposed conduct does not fall within the parameters of what the statute seeks to regulate. Hence, we hold that the appellees' representation that the statute does not proscribe the appellants' proposed conduct renders this case moot.[3]

VII. CONCLUSION

We conclude that the appellants had standing to challenge the statute, but that the appellees' conduct after the appellants filed this lawsuit rendered this case moot. Accordingly, we dismiss this appeal.

DISMISSED.

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[3]Because the challenged statute does not regulate the conduct that the appellants intend to engage in, they do not have standing to raise an overbreadth challenge to the statute. *See Dimmitt v. City of Clearwater*, 985 F.2d 1565 (11th Cir. 1993).

ORDER AND JUDGMENT OF THE DISTRICT COURT

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Clerk, U.S. District Court
Middle District of Fla.
... Florida

HON. GARY G. GRAHAM and
CHRISTOPHER LITRAS,
Plaintiffs,

v.

Case No.
92-53-Civ-Oc-16

ROBERT A. BUTTERWORTH, State of
Florida Attorney General, and
BRADLEY E. KING, State Attorney
for the Fifth Judicial Circuit,

Defendants.

ORDER

This cause is before the Court on Defendants' Motion for Summary Judgement (docket no. 19) and Plaintiffs' Motion for Summary Judgment (docket no. 21). Timely responses have been filed. Oral arguments were heard on Thursday, September 24, 1992.

STANDARD FOR SUMMARY JUDGMENT

Summary judgement is proper where, upon motion of a party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden of demonstrating, by references to the record, that no genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). Once the moving party has met its burden, the burden of production shifts to the non-moving party "to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324. Summary judgment will be entered

> after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgement as a matter of law" because

> the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. at 322-32.

BACKGROUND FACTS

In this case the facts have been stipulated. In 1990, Plaintiff, the Honorable Gary Graham, was a candidate for the office of County Court Judge for Citrus County, Florida. Plaintiff Christopher Litras supported Judge Graham in his campaign. As part of his campaign, Judge Graham paid for the printing of postcards reading: "I am supporting Judge Graham because:_____." The space provided allowed the recipient to write his or her reasons for supporting Judge Graham in his election bid. Each postcard was clearly marked "paid for by the campaign account of Gary Graham," indicating it was a paid political advertisement. In printing these postcards, Judge Graham, would mail them to other voters as a means of informing them about Judge Graham's campaign. Plaintiffs and other supporters of Judge Graham distributed 50 to 100 postcards to voters in Citrus County.

During his campaign Judge Graham received a number of unsolicited letters of support from area voters. The express written consent of the letters' authors, Judge Graham paid to have some of the letters reprinted in local newspapers as part of an advertisement for Judge Graham's candidacy. Each advertisement indicated it was a paid political advertisement by clearly stating: "paid for by campaign account for Gray Graham." These advertisements appeared on 12 different

dates in the Citrus County Chronicle, the St. Petersburg times, and the Tampa Tribune.

During the course of the election, Charles P. Horn, Judge Graham's opponent, publicly accused Graham of violating Florida Statues § 105.071(11). After discussions of the matter between Judge Graham and Defendant Bradley King, King indicated the postcards and the printing of the letters of support violated the Florida statute. However, after King's investigation indicated there was no criminal intent on Judge Graham's part and Mr. Horn said he did not wish to have the grand jury investigate the incident, Mr. King took no further action.

Judge Graham was elected County Court Judge for Citrus County and now intends to seek reelection in 1994. Plaintiff Litras intends to support Judge Graham's reelection bid. Judge Graham intends to use advertising in the form of postcards and advertisements displaying unsolicited letters of support when he seeks reelection.

The statute in question reads:

> A candidate for judicial office shall not:
>
> * * *
>
> (11) Agree to pay all or any part of an advertisement sponsored by any person, group, or organization wherein the candidate may be endorsed for judicial office by any such person, group, or organization.

Fla. State. § 105.071(11). Plaintiffs claim the statute is unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution and violates the Equal Protection Clause of The Fourteenth Amendment.

JUSTICIABILITY: IS THERE A "CASE OR CONTROVERSY?"

The Court must first determine whether it has jurisdiction in this case. The federal courts can exercise jurisdiction only in instances where there is an actual "case or controversy." U.S. Const. Art III, §2, cl. 1; Steffel v. Thompson, 415 U.S. 452, 458 (1974). A case or controversy" exists when the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." Babbit v. United Farm Workers National Union, 442 U.S. 289, 298 (1979)(citing Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93 (1945)). There must be an actual injury, one that is not hypothetical or imaginary, in order for a "case" to lie. "The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." City of Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983).

A component of the "case or controversy" requirement is the doctrine of standing. The Court must determine if the Plaintiff is the proper party to bring the lawsuit. Flast v. Cohen, 392 U.S. 83, 99-100 (1968). The rationale behind the doctrine is to guarantee that the parties have "such a personal stake in he outcome of the controversy as to assure that

concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). Article III requires that "[i]n order to establish they have standing to sue, plaintiffs must show they have suffered 'some actual or threatened injury' fairly traceable to the challenged conduct of the defendants that is likely to be redressed by a favorable decision." United Food and Commercial Workers International Union, AFL-CIO, CLC v. IBP, Inc., 857 F.2d 422, 426 (8th Cir. 1988)(citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

When it comes to challenging the constitutionality of a statute the requirement that the plaintiff suffer some personal injury is important to guarantee that the Court is not being asked to given an advisory opinion. However, Plaintiffs

> should not be required to expose themselves to prosecution to secure the desired relief as long as they have "alleged an intention to engage in a course of conduct arguable affected with a constitutional interest, proscribed by a statute, and there exists a credible threat of prosecution thereunder. . .."

Athens Lumber Co., Inc. v. Federal Election Com'n, 589 F.2d 1006, 1012 (11th Cir. 1982)(quoting Babbitt, 442 U.S. at 298). Nevertheless, these cases dealt with conduct actually prohibited by the statute in question. The threat of prosecution was real because the conduct was outlawed. If the conduct at issue is perfectly legal then the parties do not have adverse interest. Because the conduct at issue is not a

violation of Florida Statutes §105.071(11) there is no actual threat of injury and, therefore, no "case or controversy." Finding that the Plaintiffs do not have standing, summary judgment in favor of the Defendants is appropriate.

In his claim for declaratory judgment, Judge Graham argues the statute is unconstitutional on its face and as applied. Plaintiff recognizes that the state has a compelling state interest in regulating the conduct of judges, See Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 848 (1978)(Stewart, J., concurring), but claims the statute is not narrowly tailored to serve that interest. Because this Court finds that the statute is narrowly tailored, at least to the extent that it does not prohibit Judge Graham's activities, a discussion of the constitutional claims is not warranted.

"Plaintiffs . . . challenge the State's ability to prohibit the judicial candidates from taking out advertisements to inform the votes about the candidate's unpaid, unsolicited, lawfully-obtained endorsements." Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgement, p. 4. The only problem is that §105.071(11) does not prohibit judicial candidates from taking out advertisements containing unpaid, unsolicited endorsements. As long as the candidate sponsors the advertisement, the statute does not prohibit advertisements containing endorsements. The statute does prohibit candidates from paying a third person to take out an advertisement endorsing the candidate. However, because we are not faced with a situation where Judge Graham desires to pay third persons to take out advertisements, 105.071(11) does not prohibit his conduct.

Plaintiffs argue that the postcards they seek to distribute could arguable fall within the statute. This is because they read the statute as prohibiting all advertisements containing endorsements; a reading this Court has determined to be erroneous. The key words in the statute are "sponsored by." If the advertisement is not "sponsored by" a third party then the candidate can pay for the advertisement even if it contains a third party's endorsement. The postcards being mailed may contain the endorsement of a Judge Graham supporter but the postcard is clearly being sponsored by Judge Graham. Judge Graham is the one who had the postcards printed and distributed. The postcards are clearly marked as being a paid political advertisement paid for by Judge Graham. Because the statute does not prohibit a candidate for judicial office from paying for advertisements sponsored by the candidate the postcards are not in violation of the statute even though they contain an endorsement.

The advertisements containing the unsolicited letters of support are not prohibited by the statute because there is no question that Judge Graham is the sponsor of the advertisement. Judge Graham received express written consent from the letters' authors to print the letters in his advertisement. The advertisements are clearly marked "paid for by the campaign account for Gary Graham." The lay-out of the advertisement, Judge Graham's picture and a heading that reads: "FELLOW CITIZENS: Listen to what your neighbors say about Judge Graham," also indicates that Judge Graham is the sponsor of the advertisement. Because the statute does not prohibit a candidate from paying for an advertisement containing an endorsement so long as the advertisement is sponsored by the candidate and not the third

party, Judge Graham is not prohibited from printing unsolicited letters of support in the next election.

Judge Graham claims the Defendants cannot claim the statute does not prohibit his conduct because Mr. King told Judge Graham the conduct in question was a violation of the statute. The opinion of the State Attorney for the Fifth Judicial Circuit is not dispositive of the question. Besides, counsel for the Defendants maintains that Judge Graham will not be prosecuted for a violation of Florida Statutes §105.071(11) if he engages in the exact same conduct at issue in this cause. Defendants' position in this lawsuit would make a subsequent prosecution for these actions subject to a claim of judicial estoppel, the merits of which would have to be decided by the state prosecuting court. See Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257, 1261 (11th Cir. 1988; Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania, 933 F.2d 137, 143 (3rd Cir. 1991)("Having adopted the position in litigation that the [statute] is to be interpreted narrowly, the [Defendants] are barred from returning to court and adopting a contrary position."); Williams v. Kloeppel, 537 So.2d 1033, 1037 (Fla. 1st DCA 1988).

"When a statute or regulation is challenged, it should be interpreted to avoid constitutional difficulties." Stretton, 933 F.2d at 144. A narrow reading of the statute, if reasonable, should be made in order to save the statute from constitutional questions. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). While the statute is not so narrowly written merely to prohibit quid pro quo as the Defendants suggest, is not so expansive to preclude all advertising containing

endorsements as the Plaintiffs suggest. This Court holds that the statute, on its face, prohibits judicial candidates from paying for an advertisement sponsored by a third party and in which that third party endorses the candidate. As Judge Graham does not wish to pay a third party to take out an advertisement endorsing him, the statute does not prohibit the Plaintiffs' conduct. Judge Graham, therefore, is free to engage in his proposed conduct without fear of prosecution.

Accordingly, it is now

ORDERED AND ADJUDGED:

Plaintiffs' Motion for Summary Judgment (docket no. 21) is DENIED.

Defendants' Motion for Summary Judgment (docket no. 19) is GRANTED and this case is DISMISSED.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 6 day of October, 1992.

(signature) John H. Moore
CHIEF UNITED STATES
DISTRICT JUDGE

Copies to:
Nina E. Vinik, Esq.
James K. Green, Esq.
George Lee Waas, Esq.

ORDER OF THE ELEVENTH CIRCUIT DENYING REHEARING

Stamp: FILED
U.S. Court of Appeals
Eleventh Circuit
Jan. 14, 1994
Miguel J. Cortez
Clerk

No. 92-3115

HON. GARY G. GRAHAM and
CHRISTOPHER LITRAS,

Plaintiffs-Appellants

versus

ROBERT A. BUTTERWORTH,
BRADLEY E. KING,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND
SUGGESTIONS(S) OF REHEARING EN BANC

Before: FAY, HATCHETT, Circuit Judges and JOHNSON, Senior Circuit Judge

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

Joseph W. Hatchett (signature)
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

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Fla. Stat. 104.43:

104.43. Grand juries; special investigation

The grand jury in any circuit shall, upon the request of any candidate or qualified voter, make a special investigation when it convenes during a campaign preceding any election day to determine whether there is any violation of the provisions of this code,* and shall return indictments when sufficient ground is found.

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* The "code" referenced in the above statute is the election code, which includes § 105.071(11).

Fla. Stat. 105.071.11:

105.071. Candidates for judicial office; limitations on political activity

A candidate for judicial office shall not:

(1) Participate in any partisan political party activities, except that such candidate may register to vote as a member of any political party and may vote in any party primary for candidates for nomination of the party in which he is registered to vote.

(2) Campaign as a member of any political party.

(3) Publicly represent or advertise himself as a member of any political party.

(4) Endorse any candidate.

(5) Make political speeches other than in his own behalf.

(6) Make contributions to political party funds.

(7) Accept contributions from any political party.

(8) Solicit contributions for any political party.

(9) Accept or retain a place on any political party committee.

(10) Make any contribution to any person, group, or organization for its endorsement to judicial office.

(11) Agree to pay all or any part of any advertisement sponsored by any person, group, or organization wherein the candidate may be endorsed for judicial office by any such person, group or organization.

(Emphasis provided).

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Eleventh Circuit Rule 40-2:

11th Cir. R. 40-2 Time-Extensions. A petition for rehearing must be filed within 21 days of entry of judgment. Judgment is entered on the opinion filing date. No additional time shall be allowed for mailing. Counsel should not request extensions of time except for the most compelling reasons. Printing delays will not be considered sufficient justifications.